IN THE SUPREME COURT OF MISSOURI

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Appeal No. SC 92700

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Alice Roberts, Kevin Hales, Christy Millsap and Tim Millsap, et al.

*Appellants*,

vs.

BJC Health System d/b/a BJC Healthcare, Sisters of Mercy Health System, Missouri Baptist Medical Center, St. John's Mercy Health System, d/b/a St. John's Mercy Medical Center and Reconstructive and Microsurgery Associates, Inc.

*Respondents*.

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# SUBSTITUTE BRIEF OF RESPONDENT ST. JOHN'S MERCY HEALTH SYSTEM d/b/a ST. JOHN'S MERCY MEDICAL CENTER

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## STATEMENT OF THE CASE

Three patients filed this lawsuit alleging that the treating physician employed by Respondent Reconstructive and Microsurgery Associates, Inc. ("RMA") over-charged for services on bills that were sent to and paid by the patients' insurers. The patients never received those bills, did not pay them, and have admitted that they sustained no monetary damage. The patients filed the case as a putative class action, but defined the alleged class to exclude the insurers or anyone else who actually received the bills and paid the charges. When the case was removed to federal court, the District Court determined that the patients lacked standing because they had not been injured. Because standing is a jurisdictional requirement, the federal court was required to remand the case rather than dismiss it.

Following remand, and after discovery on the issue, the Circuit Court also determined that Appellants were not actually injured, and granted the Respondents summary judgment on that basis. The Eastern District Court of Appeals affirmed in a unanimous memorandum decision. This Court likewise should affirm the judgment of the Circuit Court.

## JURISDICTIONAL STATEMENT

Respondent St. John's Mercy Health Systems d/b/a St. John's Mercy Medical Center ("St. John's") submits this Jurisdictional Statement pursuant to Rule 84.04(f) because, while St. John's agrees that this Court has jurisdiction, Appellants' Jurisdictional Statement is incomplete in certain respects.

On March 16, 2011, the St. Louis City Circuit Court (Hon. Robert Dierker) granted motions for summary judgment filed by St. John's and the other Respondents, BJC Health Systems d/b/a BJC Healthcare ("BJC"), Missouri Baptist Medical Center ("Missouri Baptist"), and RMA. The same order granted judgment in favor of Respondent Sisters of Mercy Health System ("SOM"), which had filed a motion to dismiss which raised essentially the same issues as the other Respondents' motions for summary judgment. The Circuit Court granted summary judgment because, among other reasons, the record—including the testimony of Appellants and their expert—was undisputed that Appellants were not billed for and did not sustain any monetary loss or other damages by reason of the medical services that they alleged were "overbilled" by Respondent RMA or its employee Dr. Richard Coin ("Coin").

Appellants' Notice of Appeal was timely filed in the Eastern District Court of Appeals on April 21, 2011. After oral argument, on May 15, 2012, the Court of Appeals issued a unanimous memorandum opinion affirming the Circuit Court Judgment. On May 30, 2012, Appellants applied to the Court of Appeals for transfer to this Court. After that application was denied, Appellants applied for transfer to this Court, which granted transfer on August 14, 2012. This Court has jurisdiction pursuant to Missouri Constitution, Article V, Section 10.

## STATEMENT OF FACTS

St. John's submits this Statement of Facts pursuant to Rule 84.04(f) because Appellants' Statement of Facts is inaccurate and incomplete.

**Facts Relevant To The Questions Presented For Determination.** Appellants Alice Roberts, Kevin Hales, and Brittany Millsap, the minor daughter of Appellants Christy and Tim Millsap (the "Millsaps"), were patients of Coin, who was employed by Respondent RMA. LF 26.[1] Appellants alleged that Coin, through RMA, used improper codes to describe his procedures, resulting in overcharges on the bills for Coin's services.[2] LF 20-26. The case was filed as a putative class action although, as discussed in more detail below, Appellants subsequently changed their initial definition of the putative class in critical respects, and never moved for class certification.

Appellant Kevin Hales was treated on five occasions at St. John's in 2000, 2001, and 2002 and by Respondent Missouri Baptist in 2001. LF 21-22. Appellant Alice

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[1] References to the Legal File are identified as "LF __." References to the Supplemental Legal File submitted by Appellants are identified as "SLF __." References to the Supplemental Legal File submitted by Respondents are referred to as "RSLF __."

[2] While Appellants note (App. Br. 4-5) RMA's and Coin's guilty pleas in federal court pertaining to certain allegations in that suit, neither St. John's nor any other Respondent was ever indicted or even investigated concerning this alleged improper behavior.

Roberts was treated on five occasions at St. John's in 2002 and 2003. SLF 98-99. Brittany Millsap was treated once at the St. John's emergency room and on one other occasion in 2001. SLF 103. St. John's only role in the events at issue in this case is that it was where Coin treated Appellants on some occasions, and it sent bills for St. John's services to Appellants' insurers.

All of the Appellants signed forms assigning insurance benefits directly to St. John's. SLF 106. Hales and Roberts testified that they were never billed by St. John's for their treatment and that they did not pay anything for their treatment. LF 398, 404, 406; SLF 99-102. All of their expenses were billed to and paid by their employers' workers' compensation carriers. SLF 99-102. St. John's billed all charges for services provided to Roberts directly to the workers' compensation plan administered by the Missouri State Office of Administration on behalf of her employer, the Missouri Division of Employment Security. SLF 99. St. John's billed all charges for services provided to Hales to Continental Western, the workers' compensation insurance carrier for his employer, Hemsath Concrete. SLF 101.

Brittany Millsap's parents made one $75 co-payment for the emergency room services provided to their daughter at St. John's. SLF 103. The Millsaps testified that they would have made this co-payment whether or not the services Brittany Millsap received were overcharged, and the amount of the co-payment would not change no matter how the medical services were billed by St. John's or RMA and its employed physician Dr. Coin. SLF 103-04. St. John's billed all of the other charges for Brittany Millsap's care to Blue Cross Alliance, her father's group medical insurance carrier. SLF

104. Apart from the Millsaps' $75 co-payment, St. John's never billed Appellants for any treatment, and St. John's never received any other payments from them. SLF 104-05. All Appellants testified that they have not lost any money as a result of any of the actions alleged in this lawsuit. LF 400, 406, 414. They also testified that they currently do not owe any money to St. John's (or SOM) as a result of the treatment at issue in this lawsuit. SLF 100, 102, 105.

Appellants argue that "Respondents specifically endorsed RMA and Coin and referred patients to RMA and Coin." App. Br. 6. This claim is untrue and Appellants have never offered, nor could they have offered, any evidence to support it. Appellants' sole support for that contention in the record is their own allegation in their Petition.

In sum, none of the Appellants incurred any out-of-pocket expense or money damages as a result of the alleged overcharging that resulted from RMA and its employee physician Dr. Coin's alleged miscoding of his procedures.

**Procedural History.** The procedural history of this lawsuit —and specifically, the aspects that Appellants omitted from their Brief—are particularly significant because they illustrate how Appellants' own deliberate tactical decisions resulted in a case where the plaintiffs did not and could not allege any damages, resulting in the decisions below.

Appellants filed the original version of this lawsuit in St. Louis City Circuit Court on June 18, 2004 (Case No. 042-07187). RSLF 277. The causes of action, which remained essentially the same in the later phases of the case, included claims for fraud, fraudulent concealment/failure to disclose, negligent misrepresentation, breach of fiduciary duty, breach of contract, breach of good faith and fair dealing, violations of the

Missouri Merchandising Practices Act, "hospital corporate negligence – negligent extension of monitoring of hospital privileges", "negligent referral", and civil conspiracy claims. See RSLF 1-2.

Appellants defined the class as "all persons who…were asked or required, through or as a result of miscoding by RMA or Coin, to approve, pay, allow to be paid, and/or have paid…any amounts…." RSLF 32 (emphasis added). Appellants alleged that they filed on behalf of "all persons or entities who are members of the Class." RSLF 31 (emphasis added). Thus the class definition necessarily included entities such as the insurers or benefit plans that were actually billed for and paid for medical services. For that and other reasons, the case was preempted by the Employee Income Retirement Security Act of 1974, 29 U.S.C.A. § 1001, et seq. ("ERISA"). St. John's removed the case to federal court (Eastern District of Missouri) on that basis on August 12, 2004. See Roberts v. BJC Health Sys., 452 F.3d 737 (8th Cir. 2006). Before the Court could rule on the Respondents' pending dispositive motions, the Appellants, on October 12, 2004, voluntarily dismissed the first version of this lawsuit and on the same day re-filed the case in St. Louis City Circuit Court. LF 23-24; RSLF 111-112. This second iteration of the lawsuit is the one that proceeded and is the subject of this appeal.

In the second version of the lawsuit, Appellants changed the definition of the purported class. LF 48. Appellants now defined the class as "all natural persons who…were asked or required, through or as a result of miscoding by RMA and/or Coin, to pay, approve, allow to be paid, and/or have paid…any amounts…." (emphasis added). LF 48. By limiting the class to "natural" persons, Appellants sought to exclude ERISA

plans and other insurers so that Appellants could argue (incorrectly) that the case was no longer subject to ERISA preemption and thus could not be removed to federal court.

On November 10, 2004, St. John's again removed the re-filed case to the Eastern District of Missouri federal court on grounds of ERISA preemption. RSLF 277. Challenging removal, Appellants argued in federal court that they were not pursuing claims as beneficiaries of any health plans or that related to benefits that would be due to Appellants under any such health plans. See, e.g., RSLF 189. To defeat removal and dismissal for ERISA preemption, Appellants thus represented to the court that third-party health plans and insurance companies were not involved in this matter. Recognizing that all sums were paid by insurance companies and other third-party payers, and thus realizing Appellants were pursuing a class action that (by Appellants' own definition) involved no damages, St. John's and the other Respondents filed motions to dismiss arguing, among other things, that the Appellants' claims were completely preempted by ERISA, and Appellants lacked standing because they had not sustained a cognizable injury in fact. RSLF 284-302.

On March 11, 2005, the District Court granted Respondents' motions to dismiss because Appellants did not suffer an injury in fact and therefore lacked standing. LF 582-592. Solely because the case had been removed to, rather than originally filed in, federal court, Appellants sought reconsideration of that Order. On May 4, 2005, the District Court granted reconsideration and ruled that 28 U.S.C. § 1447(c) required it to remand the case to state court rather than dismiss it because Appellants' lack of standing meant that the federal court had no subject matter jurisdiction. RSLF 432-435.

St. John's and the other Respondents appealed the remand order to the Eighth Circuit because Respondents believed that the District Court's conclusion that Appellants lacked standing required dismissal of the case, not remand to state court. The Eighth Circuit agreed with the District Court that there was no jurisdiction, ruling that Appellants "lacked standing because they had not sustained an injury in fact." Roberts, 452 F.3d at 738. The Eighth Circuit recognized that the likely result of Appellants' failure to plead a cognizable injury would be dismissal in state court after remand. Id. at 739. That Court observed that "[o]ne remedy to this dilemma is including a class member in the case who sustained an injury in fact." Id.

After the case returned to state court, on November 18, 2008, the Court entered a scheduling order that provided that "[t]he parties have agreed to defer all scheduling until defendants pursue their writ of appeal on venue … upon conclusion of the venue appeal … the parties shall pursue discovery limited to the issue of standing and named plaintiffs' injury in fact[,]" after which the Circuit Court would consider summary judgment motions on that issue. SLF 82-83.

In accordance with the November 18, 2008 Order, the Parties then conducted discovery limited to the questions of Appellants' standing and injury in fact. That discovery included interrogatories, requests for production of documents, requests for admission, and depositions of the Appellants and Appellants' expert Dr. Raymond Janevicius.

After the parties completed discovery on the standing and injury issues, on November 17, 2009, SOM filed a motion to dismiss and St. John's and the other

Respondents moved for summary judgment. LF 251-53, 379-81, 594-739, 740-802; RSLF 473-563. Appellants never sought relief under Rule 74.04(f).

On March 16, 2011, the Circuit Court granted Respondents' dispositive motions. LF 1266. The Circuit Court correctly summarized the reasons why summary judgment was required: "[t]he crux of this case is whether [Appellants] can proceed with a massive class action to recover money that incontrovertibly they never lost." LF 1262. The Circuit Court succinctly and correctly answered that question with one word: "No." Id.

The Circuit Court correctly concluded what the federal District Court and the Eighth Circuit had previously found: that "[e]very single theory advanced by [Appellants] suffers from the same fallacy: [Appellants] have presented no evidence showing that they have been harmed in reality." LF 1262. The Circuit Court also ruled RSMo. § 287.140.13 [3], which governs workers' compensation insurance claims, prohibits Respondents from recovering any of the costs of the services performed for Roberts or Hales, who were covered by their employers' workers' compensation insurance. LF 1262. The Circuit Court accordingly entered judgment in favor of St. John's and the other Respondents. LF 1266.

Appellants appealed to the Eastern District Court of Appeals, which on May 15, 2012, issued a unanimous memorandum opinion affirming the Circuit Court. The Court

[3] Unless otherwise noted, all references to RSMo. and the Missouri Code of State Regulations are to the current versions of those statutes and regulations.

of Appeals came to the same conclusion as the federal court and the Circuit Court: "Regardless of whether the issue is characterized as one of standing or as one of failure of proof of the element of damages, the undisputed facts show that [Appellants] did not suffer any alleged harm." E.D. Op. 5. As a result, "[Respondents] were entitled to judgement as a matter of law." Id. at 8.

## ARGUMENT

### I. THE CIRCUIT COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO RESPONDENTS BECAUSE APPELLANTS DID NOT SUSTAIN ANY INJURY IN FACT AND SUFFERED NO DAMAGES AND THEREFORE HAD NO STANDING AND COULD NOT PROVE AN ESSENTIAL ELEMENT OF ALL THEIR CLAIMS (RESPONDING TO APPELLANT'S SOLE POINT RELIED ON)

Appellants' claims were dismissed because they were not injured and sustained no damages. There seemingly is nothing remarkable about a judgment dismissing a claim brought by plaintiffs who admitted they did not suffer any damages. Appellants nevertheless have spent the last eight years trying to keep this case alive by obscuring that simple truth. They have done so by injecting issues such as the real party in interest rule, subrogation and the collateral source doctrine, which upon examination simply are irrelevant to the basic and fundamental question of whether a plaintiff who has not been damaged has any cognizable cause of action.

The real party in interest, subrogation and collateral source issues have no relevance here for a very simple reason. These are principles that apply in some instances when the plaintiff is suing for damages for which the plaintiff has insurance that covers the loss in whole or part. As discussed in more detail below, that is what happened in literally every case Appellants cite involving subrogation, the collateral source rule, or whether an insured party can be the real party in interest. In such situations, the insurer may be subrogated to the rights of the plaintiff but the plaintiff can

still sue the tortfeasor, and the defendant in some instances may not be permitted to refer to the fact that insurance covers some or all of the loss.

The principles underlying subrogation, the real party in interest doctrine and the collateral source rule are well settled and unexceptional. They also have absolutely no bearing on the issues in this case, because Appellants did not have insurance that covers the losses that are at issue here. Appellants had medical insurance that covered the costs of their medical care. Appellants did not have insurance that would compensate them for any loss they suffered by reason of being overcharged. They did not file a claim with their insurers for such losses, nor could they because they did not have such policies. (And, it bears repeating, they did not suffer any such loss in any event, because they were never billed and never paid the alleged overcharges).

The Court of Appeals correctly recognized this when it ruled that "[Appellants] had their various medical expenses paid for by third parties pursuant to insurance contracts. If those third parties were victims of a fraud perpetrated against them, the injury or harm does not transfer to [Appellants]; it remains with the injured third parties." E.D. Op. 8.

For these reasons, the fact that the entities that actually were damaged happen to be insurance companies (who are not parties to the lawsuit) does not implicate the collateral source rule or the subrogation doctrine. Those principles only apply to insurance coverage for the injuries at issue in the litigation. And Appellants who were never damaged in the first place cannot claim a cognizable injury merely because their insurance companies, which were not parties to the lawsuit, might have been overbilled

for medical care provided to Appellants that Appellants were not billed for and did not pay for.

### A. Standard Of Review

This Court can affirm a grant of summary judgment "under any theory that is supported by the record." Glasgow Enter., Inc. v. Bowers, 196 S.W.3d 625, 629 (Mo. App. E.D. 2006). Whether summary judgment is appropriate is a question of law, essentially reviewed de novo. Bellistri v. Ocwen Loan Servicing, LLC, 284 S.W.3d 619, 621-22 (Mo. App. E.D. 2009). Summary judgment is proper where "the movant establishes the absence of any genuine issue of material fact and a legal right to judgment." Id.

"To have standing, the party seeking relief must have 'a legally cognizable interest' and 'a threatened or real injury.'" Manzara v. State, 343 S.W.3d 656, 659 (Mo. Banc 2011), quoting E. Mo. Laborers Dist. Council v. St. Louis Cnty., 781 S.W.2d 43, 45-46 (Mo. banc 1989). Whether a plaintiff lacks standing is a question of law that is particularly appropriate for disposition on summary judgment. E.g., Bellistri, 284 S.W.3d at 621-22 (affirming grant of summary judgment where plaintiff lacked standing).

### B. The Circuit Court Correctly Found Appellants Sustained No Injury In Fact and Suffered No Damages

The judgment in favor of Respondents could be affirmed on two bases. First, the Appellants lacked standing to sue Respondents because they suffered no injury in fact. *See* Manzara, 343 S.W.3d at 659. Both the federal District Court and the Eighth Circuit held that Appellants "lacked standing because they had not sustained an injury in fact."

Roberts, 452 F.3d at 738. Second, the Appellants sustained no damages. The Circuit Court and the Court of Appeals based their decisions primarily on their conclusion that Appellants had submitted no evidence that they were damaged. LF 1265; E.D. Op. 5. This was correct for two reasons. First, as the Court of Appeals correctly affirmed (E.D. Op. at 5), Appellants submitted no evidence of damages. LF 1262-64. Indeed, Appellants actually testified (accurately) that they lost no money. LF 400, 406, 414. Second, as the courts correctly found, and as Appellants do not dispute, evidence of actual damages is an element of every cause of action pleaded by Appellants. LF 1262-63. As this Court has repeatedly observed, where the undisputed facts refute an element of the pleaded cause of action, summary judgment is proper. Chouteau Auto Mart, Inc. v. First Bank of Missouri, 55 S.W.3d 358, 360 (Mo. banc 2001).

An element of each cause of action pleaded by Appellants was that they sustained damages that were proximately caused by the alleged actions of St. John's or the other Respondents. For example, actual damages are an element of Appellants' fraud claims (Counts I, XI, and XVIII; LF 52-53, 64-65, 71-72). MLJ Inv., Inc. v. Reid, 905 S.W.2d 900, 901-02 (Mo. App. E.D. 1995). Actual damages are also an element of the fraudulent concealment/failure to disclose claims (Counts II, XII, and XIX; LF 54-55, 65-66, 72-73). The Kansas City Downtown Minority Dev. Corp., v. Corrigan Assoc. Ltd. P'ship, 868 S.W.2d 210, 218-19 (Mo. App. W.D. 1994).

Similarly, damages are an element of the negligent misrepresentation claims in Counts III, XIII, and XX (LF 55-56, 66-68, 74-75), Ziglin v. Players MH, L.P., 36 S.W.3d 786, 790-91 (Mo. App. E.D. 2001); the breach of fiduciary duty claims in Counts

IV, XIV, and XXI (LF 56-57, 68, 75-76), Koger v. Hartford Life Ins. Co., 28 S.W.3d 405, 411 (Mo. App. W.D. 2000); the breach of contract claims in Counts V, XV, and XXII (LF 57, 68-69, 76), Fidelity Nat. Title Ins. Co. v. Tri-Lakes Title Co., Inc., 968 S.W.2d 727, 730 (Mo. App. S.D. 1998); the breach of duty of good faith and fair dealing claims in Counts VI, XVI, and XXIII (LF 58, 69-70, 77), Koger, 28 S.W.3d at 413; the Missouri Merchandising Practices Act ("MMPA") claims in Counts VII, XVII, and XXIV (LF 58-59, 70-71, 77-78), Ziglin, 36 S.W.3d at 790; the "hospital corporate negligence – negligent extension of monitoring of hospital privileges" claims in Counts VIII and IX (LF 59-61), Meadows v. Friedman R.R. Salvage Warehouse, Div. of Friedman Bros. Furniture Co., Inc., 655 S.W.2d 718, 720 (Mo. App. E.D. 1983); the "negligent referral" claim in Count X (LF 61-63), Meadows, supra; the negligence claim in Count XXV (LF 78-79), Meadows, supra; and the civil conspiracy claim in Count XXVI (LF 79-80). Mackey v. Mackey, 914 S.W.2d 48, 50 (Mo. App. W.D. 1996).[4]

As evidenced by the cases cited in the two preceding paragraphs, dismissal is proper where the plaintiffs do not show that they sustained any damage as a result of the defendant's alleged conduct. For this reason, the judgment below was correct.

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[4] There is no specific cause of action in Missouri for "hospital corporate negligence – negligent extension and monitoring of hospital privileges" or for "negligent referral." But assuming these are variations on common law negligence, damages is an element of each cause of action for the reasons discussed above.

Freeman Health Sys. v. Wass, 124 S.W.3d 504 (Mo. App. S.D. 2004), cited by both the Circuit Court (LF 1263) and the Court of Appeals (E.D. Op. at 6), is a remarkably similar case that illustrates why summary judgment was proper here. The counterclaim plaintiff (hereinafter "plaintiff") in Freeman was treated at a health facility that he alleged had "charged him a higher amount than the usual and customary charges for such goods and services…after falsely representing that the stated prices were the usual and customary values for such goods and services." 124 S.W.3d at 506. The Freeman plaintiff, like the Appellants, alleged that these overcharges violated the MMPA, RSMo. 2000 § 407.010 et. seq. Id. (The MMPA claims in this case were Counts VII, XVII, and XXIV of Appellants' Petition, LF 58-59, 70-71, 77-78). Freeman, like this case, was a purported class action on behalf of individuals who "were also unfairly billed" by the facility. Id. The court was unable to find any legal theory upon which a plaintiff could recover under these facts. Id. at 508 ("As mandated by our [S]upreme [C]ourt, we have reviewed Appellant's counterclaim and associated pleadings 'to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in [the] case.' We find none."), quoting, Reynolds v. Diamond Foods & Poultry, Inc., 79 S.W.3d 907, 909 (Mo. banc 2002)(emphasis added).

Also like Appellants here, the Freeman plaintiff "did not remit any payment" for any of the services he claims were overcharged. Id. at 505. The trial court in Freeman dismissed the petition because the plaintiff sustained no cognizable injury, and the Southern District Court of Appeals affirmed. The Court of Appeals ruled that the plaintiff must prove that he "suffered an ascertainable loss of money … [as] a

prerequisite to recovery" under the Missouri Merchandising Practices Act. Id. at 507. The Court rejected arguments that the plaintiff stated a cause of action because he might suffer future injury if he had to pay future charges, or because the plaintiff was also seeking equitable relief to prevent future overcharges. Id. at 507-08.

Appellants make essentially identical arguments as to why they have cognizable injuries notwithstanding that they made no payments and lost no money as a result of the allegedly inaccurate bills that went to their insurers. E.g. App. Br. 32-35. Appellants' position should be rejected for the same reasons that the Court of Appeals rejected it in Freeman.

Appellants argue (App. Br. at 34) that Plubell v. Merck & Co., 289 S.W.3d 707 (Mo. App. W.D. 2009) supports their position that they had cognizable injuries under the MMPA. Plubell is irrelevant, however, because it only discussed class certification issues, and did not rule on whether the plaintiffs' MMPA claims were cognizable. Id. at 716. Moreover, as the Circuit Court pointed out Plubell stands only for the unremarkable proposition that "a claim can be stated by a MMPA plaintiff who alleges that a defendant's deception resulted in purchase of a product that was worth less than it was represented to be." LF 1263 (emphasis added). That principle is of no assistance to Appellants, who received the medical care they bargained for at no cost to them.

Appellants also cite Breeden v. Hueser, 273 S.W.3d 1 (Mo. App. W.D. 2008) and Hoover v. Mercy Health, No. ED97495, 2012 WL 2549485 (Mo. App. E.D. July 3, 2012) to support their claim that they sustained "ascertainable damages" under the MMPA. Breeden is inapposite because, like Plubell, it does not address damages at all, but instead

involves unrelated issues such as the statute of limitations and federal preemption. 273 S.W.3d at 7-8. Hoover, on the other hand, actually supports Respondents' position that a party does not have a cognizable claim under the MMPA unless it actually suffers a monetary loss.

The plaintiff in Hoover alleged that he had been fraudulently overcharged for medical services in violation of the MMPA. Id. at *1. The plaintiff was billed $17,337.29 but only paid $5,300. Id. at *2. The Circuit Court granted defendants' motion to dismiss, which asserted that the plaintiff could not prove that $5,300 was more than the reasonable cost of the medical treatment he received, and thus could not allege an "ascertainable loss" as required by the MMPA. Id. at *4. The Eastern District Court of Appeals relied on Freeman in affirming, stating that "Freeman clarified that an 'ascertainable loss' results from the payment of money, not from the fact a bill was issued." Id. at *5. Here, Appellants paid no money for their medical treatment and thus could not have suffered an "ascertainable loss" under the MMPA even though bills were issued to their insurance companies for the costs of their medical care.

In sum, Plubell and Breeden did not disagree with or overrule Freeman and Hoover reaffirmed the validity of Freeman. Accordingly, a patient who claims he was overcharged for medical care, but did not pay for the services, suffered no cognizable injury and cannot bring suit under the MMPA.

### C. Appellants Did Not Sustain Any Damages Because Of The "Real Party In Interest" Principle Or Because Their Insurers Had Subrogation Rights

The purpose of the real party in interest rule is "to enable those who are interested in the subject matter of the action and entitled to the benefits of the litigation to be those who maintain the action." Herky, LLC v. Holman, 277 S.W.3d 702, 704 (Mo. App. E.D. 2008) (emphasis added); see also, Twin Chimneys Homeowners Ass'n v. J.E. Jones Const. Co., 168 S.W.3d 488, 495-96 (Mo. App. E.D. 2005) (holding homeowners association was the real party in interest despite not owning the property at issue as they were the ones "entitled to the benefits of the litigation against Appellants").

In other words, the purpose of the real party in interest rule is to identify which party actually has a stake in the outcome of the case. Appellants admit they were not billed for and did not pay any of the medical bills, and therefore did not sustain any loss. SLF 100, 102, 105. Appellants therefore have nothing at stake in this case and are not the real parties in interest by that standard. But more fundamentally, even a real party in interest must sustain an actual injury when that is an element of the cause of action that a party seeks to assert. See S & P Props., Inc. v. Daly, 330 S.W.3d 128, 131 (Mo. App. E.D. 2010) (finding plaintiff was the real party in interest where it had "an actual injury in the form of money paid for the property.") The Appellants have admitted that they paid no money for their medical treatment and therefore logically could not have suffered any actual damages.

Nevertheless, Appellants claim that they are the real party in interest because "[a]n insurer who pays a loss does not become the real party in interest unless the insured has

assigned the underlying claim to the insurer." App. Br. 13. They rely on Protection Sprinkler Co. v. Lou Charno Studio, 888 S.W.2d 422 (Mo. App. W.D. 1994) and Keisker v. Farmer, 90 S.W.3d 71 (Mo. banc 2002) for this assertion. Both cases are inapposite for the reason discussed above at the outset of the Argument section of this Brief (pp. 13-15): in these cases (and every other one Appellants cite involving insurance), the plaintiff suffered an actual injury for which he had insurance coverage.

In Protection Sprinkler, the plaintiff had been sued by the defendant for negligence in connection with a fire at the defendant's studio. 888 S.W. at 423. The parties settled the earlier suit, and as part of the settlement agreement the defendant agreed to indemnify the plaintiff against any losses from third party suits. Id. A third party sued the plaintiff and the defendant refused to indemnify the plaintiff. Id. As a result, the plaintiff sued the defendant for breach of contract. Id. The defendant claimed that because the plaintiff's insurer had paid the costs of litigation with the third party, the insurer, not the plaintiff, was the real party in interest. Id. at 424. The court found that the plaintiff had been injured by the breach of contract, and it retained the claim regardless of the fact that the insurer paid for the costs of litigation i.e. the damages that resulted from the breach of contract. Id.

In Keisker, a St. Louis police officer crashed into a store, and the store's insurer paid the cost of repairs and reimbursed the store for its loss of income and profits. 90 S.W.3d at 73-74. The store owner sued the officer and the City of St. Louis for negligence, but only sought damages for lost profits and income. Id. The insurer intervened claiming that the store owner had assigned it all causes of action related to the

incident. Id. The trial court found that the store owner had assigned his claims to the insurer and awarded the insurer the damages paid by the City. Id. The store owner appealed claiming that he retained the cause of action and that the insurer only had a right of subrogation. Id. This Court reversed the trial court holding that an insured retains a cause of action unless he specifically assigns it to his insurer. Id.

In both Protection Sprinkler and Keisker the plaintiff was injured by a third party and sustained damages, i.e. the costs of litigation and lost profits and income. Plaintiffs had insurance coverage for those losses, and the insurers paid the insureds the covered amounts. In those situations, the plaintiffs were actually injured and were the real party in interest so that the insurance companies only had subrogation rights to recoup from their insureds any amounts the insureds recovered from the defendants.

In contrast, here Appellants did not have insurance that covered them for a "loss" sustained by reason of being overcharged, and they have not sought to recover from their insurers for such (non-existent) "losses." Furthermore, Appellants never suffered an injury so they never had a claim against the Respondents that their insurers would be subrogated to. As a result, the real party in interest rule is irrelevant to this case.

Appellants' related subrogation argument (App. Br. 13-14) fails for the same reasons and also contradicts Appellants' position taken much earlier in this case when they were trying to defeat removal to federal court. There, Appellants represented that third-party payers were not involved, that this case only involves "natural persons," and that those persons are pursuing the case on their own behalf and not as beneficiaries of any health plans or insurance policies. See, e.g., RSLF 196, 199-200, where Appellants

stated in their opposition to remand that Appellants "do not purport to, and do not desire to, represent a class that would include entities that may be third party payors" and that Appellants' "claims herein are not brought in their capacity as ERISA plan participants or beneficiaries."

Those statements can only mean that Appellants were not pursuing subrogated claims of others. Thus, the federal District Court correctly ruled that Appellants could not establish a cognizable injury by relying on the amounts paid by their or their employers' insurance carriers. LF 582-592. The Circuit Court and the Court of Appeals reached the same correct conclusion.

Appellants also claim that the Appellants Roberts and Hales are the real parties in interest and have the right to bring this action because "an employee who suffers a workplace injury retains the right to control any legal action against a third party who might have liability in connection with the injury." App. Br. 30; see also Ruediger v. Kallmeyer Bros. Serv., 501 S.W.2d 56, 59 (Mo. banc 1973); State ex rel. Missouri Highway and Transp. Comm'n v. Copeland, 820 S.W.2d 80, 84 (Mo. App. S.D. 1991). Appellants submit that under these cases, because Roberts and Hales sustained their injuries at work, they have the right to pursue damages against Respondents for the inflated bills paid by their insurers. The flaw in this reasoning is the same as in their subrogation argument: Appellants were not injured by the negligence of a third party and therefore never had a cause of action to be "retained." In Ruediger, Copeland and every other case cited by the Appellants, the employee suffered an injury and brought suit against a third party who might have been liable for the injury. This case, in contrast, has

nothing to do with recovering damages from a third party tortfeasor who caused an employee's injury. Instead, Appellants are bringing suit against Respondents for alleged overcharges paid by their insurers. Thus, there is no question of whether the Appellants "retained" their cause of action because they never had a cause of action to "retain."

### D. Appellants Did Not "Incur" Any Damages Because They Were Not Billed For And Did Not Pay The Charges And Because Under The Workers' Compensation Laws They Cannot Be Liable For Any of the Costs of Their Medical Care

Appellants point to provisions in their contract stating that Appellants could be responsible if their insurers did not pay their bills and argue that these provisions created a cognizable injury because Appellants "incurred" (i.e., became potentially liable for) the charges even if they did not pay them. App. Br. 15-16. This argument is without merit because a litigant claiming that he might be injured in the future is making a hypothetical claim that does not state a cause of action.

Berra v. Danter, 299 S.W.3d 690, 695-96 (Mo. App. E.D. 2009), Brown v. Van Noy, 879 S.W.2d 667 (Mo. App. W.D. 1994), and Wheeler ex rel. Wheeler v. Phenix, 335 S.W.3d 504 (Mo. App. S.D. 2011), all referred to by Appellants, do not support their position. Those cases construed RSMo. § 490.715.5, which is a statutory modification of the collateral source rule and specifies that a party who was injured "as a proximate result of the negligence of any party" may submit evidence of the "value of the medical treatment rendered" to the injured party. Id. In some situations as set forth in the statute, either party can submit evidence of the reasonable value of the medical treatment, and the

court can determine "outside the hearing of the jury, the value of the medical treatment rendered based upon additional evidence, including but not limited to" the amount the injured party incurred, actually paid, or would be required to pay if the injured party recovers. RSMo. § 490.715.5(2).

RSMo. § 490.715.5 is a statutory modification of the collateral source rule which does not apply to this case for the reasons discussed in the next section of this Brief. The specific modification reflected in the statute and in the cases construing it that Appellants cite is irrelevant for similar reasons. In each case cited by Appellants, a plaintiff who was injured by the defendant's negligence sought to introduce evidence of the reasonable value of the medical care rendered, and was permitted to do so pursuant to RSMo. § 490.715.5. Wheeler, 335 S.W.3d at 517-18; Berra, 299 S.W.3d at 697-98; Brown, 879 S.W.2d at 676-77.

That statute, and the cases relied on by Appellants that construe it, are irrelevant because Appellants were not injured by the negligence of another party, and are not suing to recover the medical expenses they incurred by reason of their doctor's negligence. They are claiming that medical bills that were sent to their insurers included overcharges. The insurers who paid any alleged overcharges are the injured parties and RSMo. § 490.715.5 does not apply to such a situation. (Moreover, the insurers were not injured by the negligence of another, and the statute a fortiori would not apply to them in any event.)

Appellants also cite Litton v. Kornbrust, 85 S.W.3d 110 (Mo. App. W.D. 2002), Burwick v. Wood, 959 S.W.2d 951 (Mo. App. S.D. 1998) and Next Day Motor Freight,

Inc. v. Hirst, 950 S.W.2d 676 (Mo. App. E.D. 1997) to support their argument that a plaintiff can "incur" damages even if he or she suffers no monetary loss. These cases discuss RSMo. 2000 § 492.590, which states that a party "incurring" the cost of deposing another party may under certain circumstances recover that cost from that party. Litton and Kornbrust both found that a party may "incur" deposition costs, and therefore recover them, even if their insurer paid the costs. Litton, 85 S.W.3d at 115-16; Burwick, 959 S.W.2d at 952.

These decisions are unremarkable and are variations on the same principle applied in the cases construing RSMo. § 490.715.5: a party who has been injured can recover the expenses incurred as a result of that injury, even if those expenses were reimbursed by an insurer (which then has subrogation rights to recoup those amounts from its insured). Again, that did not happen here: the "injury" of being overcharged is not one for which Appellants had insurance coverage or sought reimbursement from their insurer.

Appellants also argue that they "incurred" liability because they would have had to pay some of the overcharges at some unspecified time in the future if their insurers had not paid them. App. E.D. Br. 19-21. As discussed below, there actually is no possibility of that happening because the workers' compensation statutes prohibit it, and because it is undisputed that the insurers have already paid the bills. SLF 99, 101, 104. Leaving aside those fatal defects to their position, Appellants' arguments must fail under the ripeness doctrine. E.g. Buechner v. Bond, 650 S.W.2d 611, 614 (Mo. banc 1983) ("Ripeness does not exist when the question rests solely on a probability that an event will occur").

Another reason that Appellants Roberts and Hales sustained no cognizable injury is that their bills were sent directly to, and paid by, their employers' workers' compensation carriers. SLF 99, 101. The Circuit Court correctly ruled that Missouri statutory law actually prohibits Respondents from seeking to recover any amounts covered by workers' compensation from those Appellants. LF 1262.

Missouri's workers' compensation laws require, among other things, that (1) the employers of Roberts and Hales provide reasonable medical care resulting from a work related injury, (2) an employee whose treatment is covered by workers compensation insurance like Roberts or Hales "shall not be a party to a dispute over medical charges", and (3) no hospital or health care provide such as St. John's "shall bill or attempt to collect any fee or any portion of a fee for services rendered to an employee due to a work-related injury." RSMo. § 287.140 (cited by the Circuit Court, LF 1262).

As required by RSMo. § 287.140.4, the Division of Workers' Compensation has established by regulation a mandatory process to "govern resolution of disputes between employers and medical providers over fees charged, whether or not paid." Cox Health Sys. v. Div. of Workers' Comp. of Dept. of Labor and Indus. Relations, 190 S.W.3d 623, 627 (Mo. App. W.D. 2006). That is the same statutory provision that states that "[t]he employee shall not be a party to a dispute over medical charges." Id. This mandatory regulatory process does not permit an individual like Roberts or Hales who was injured in connection with employment and whose treatment is covered by workers' compensation to be involved in the fee resolution process. RSMo. § 287.140.4; see also MO. CODE REGS. ANN. tit. 8, § 50-2.030. Rather, the only parties to the medical fee dispute

resolution process are the health care provider, employer, and insurer. MO. CODE REGS. ANN. tit. 8, § 50-2.030.

Accordingly, St. John's would be forbidden by law from seeking to recover any of the costs for the services provided to Roberts and Hales. Appellants point to an exception in RSMo. § 287.140.13(3) that they claim applies to "noncompensable" charges (App. E.D. Br. at 37), but there was no claim here that any charges were "noncompensable" and Appellants all testified they owed nothing and lost nothing.

## II. THE COLLATERAL SOURCE RULE IS INAPPLICABLE AND CANNOT CONFER STANDING ON APPELLANTS BECAUSE APPELLANTS DID NOT SUFFER ANY INJURY AND HAVE NO DAMAGES

### A. The Collateral Source Doctrine Is Inapplicable Because Appellants Sustained No Damages and Had No Insurance to Protect Against Overbilling

Appellants argue that the Circuit Court "used" the collateral source rule to "preclude Appellants' claim of damages." App. Br. 25. This is incorrect. The Circuit Court and the Court of Appeals did not "use" the rule, but instead correctly found that it was inapplicable because the Appellants did not suffer any damages to which the rule might apply. SLF 137; E.D. Op. 8.

The collateral source rule "prevents an alleged tortfeasor from attempting to introduce evidence at trial that the plaintiff's damages will be covered, in whole or in part, by the plaintiff's insurance." Smith v. Shaw, 159 S.W.3d 830, 832 (Mo. banc 2005).

This statement confirms the two reasons why the Circuit Court and the Court of Appeals were correct to conclude that the rule is not applicable here. First, as Smith states, the collateral source rule only applies if a plaintiff has insurance that covers the damages he or she is claiming at trial. In other words, the collateral source rule is a rule of evidence that specifies when evidence of insurance coverage may be introduced at trial; it is not a rule of substantive law that creates damages where none exist.

Second, the collateral source rule also requires that the plaintiff have insurance that covers the loss for which the plaintiff is suing. Here, Appellants did not have any insurance that covered losses they might incur by reason of being overcharged. Appellants had medical insurance, which covers them for a different type of loss—the expenses they incurred as a result of needing medical services. They did not sue to recover those losses because they were not billed for and did not pay any of the charges. The parties that were injured if there were any overcharges—the insurance companies that were actually billed and that actually paid the charges—did not sue for any such losses. For these reasons, the collateral source rule is inapplicable here.

### B. The Collateral Source Rule Cannot Be Used to Confer Standing on a Party That Sustains No Damages

Appellants cite a litany of cases for the proposition that the collateral source rule is not only an evidentiary rule, but also "a part of the substantive law of damages." See, e.g., Schwartz v. Hasty, 175 S.W.3d 621, 629 (Ky. App. 2005); Leitinger v. DBart, Inc., 736 N.W.2d 1 (Wis. 2007). This is a semantic argument that does not change the fundamental fact that Appellants were not damaged here. If Appellants mean to assert

that the collateral source rule can be used not only to exclude evidence that a plaintiff's damages were paid for by insurers or other third parties, but also to prevent a plaintiff's damages from actually being reduced by such amounts, the statement is unremarkable and irrelevant. The fact that damages may in some instances not be reduced because they were reimbursed by insurance (but subject to the insurer's subrogation rights) does not mean that a party who was never damaged in the first place can claim he or she was damaged because his or her insurance company allegedly was overcharged.

Appellants do not cite a single case where a party that suffered no injury and no damages was nevertheless allowed to bring a lawsuit based on the collateral source rule. Furthermore, this Court made clear that the collateral source rule only applies if a plaintiff sustains an injury: "The collateral source rule prevents a tortfeasor from reducing his liability to an injured person by proving that payments were made to the person from a collateral source." Smith, 159 S.W.3d at 832 (emphasis added). The federal District Court made a similar observation when it ruled that "Contrary to Plaintiffs' assertion, the Court finds no authority for the proposition that the [collateral source rule] may operate to confer standing on parties who have suffered no injury in fact." LF 590.

The numerous cases and articles cited by Appellants for their collateral source argument stand only for the proposition that under the rule payments to a plaintiff from private insurance or workers' compensation cannot be used to reduce the plaintiff's damages. In each instance, the party invoking the rule clearly suffered an injury for which he was insured, and thus the only question was the amount of monetary damages.

not whether the plaintiff could recover in the absence of any monetary damages.[5] As a

[5] Every Missouri case in the treatise Appellants cite involves a plaintiff seeking to recover for a physical injury. See, Dag E. Ytreberg, Collateral Source Rule, 77 A.L.R.3d 415 (2009). Similarly, the case note Appellants rely on discusses a lawsuit where the injured party had physical injuries. See Richard C. Witzel, Jr., Note: The Collateral Source Rule and State-Provided Special Education Therapy, 75 Wash. U. Law Quarterly 697, 699 (Spring 1997). The other inapposite cases cited by Appellants include Washington v. Barnes Hosp., 897 S.W.2d 611 (Mo. banc 1995) (concerning amount of recovery for permanent brain damage to a newborn); Buatte v. Schnuck Mkts., Inc., 98 S.W.3d 569 (Mo. App. E.D. 2002) (personal injuries resulting from a slip and fall); Lampe v. Taylor, 338 S.W.3d 350 (Mo. App. S.D. 2011) (personal injuries resulting from an automobile accident); Kickham v. Carter, 335 S.W.2d 83 (Mo. 1960) (same); Ford v. Gordon, 990 S.W.2d 83 (Mo. App. W.D. 1999) (same); Smith, 159 S.W.3d 830 (same); Duckett v. Troester, 996 S.W.2d 641 (Mo. App. W.D. 1999) (personal injuries from cheerleading accident); Porter v. Toys 'R' Us-Delaware, Inc., 152 S.W.3d 310 (Mo. App. W.D. 2004) (personal injuries resulting from merchandise falling from store shelf); Womack v. Crescent Metal Prods., Inc., 539 S.W.2d 481 (Mo. App. 1976) (personal injuries resulting from defect in metal serving cart); Douthet v. State Farm Mut. Auto. Ins. Co., 546 S.W.2d 156 (Mo. 1977) (personal injuries from an automobile accident); Kenniston v. McCarthy, 858 S.W.2d 268 (Mo. App. E.D. 1993) (same); Taylor v.

result, the cases and articles are of no relevance here, as the question is not the amount of damages sustained, but whether Appellants can bring a suit in the absence of any monetary damages whatsoever.

Courts outside Missouri have rejected similar attempts to use the collateral source rule to create standing where the plaintiff has not sustained an injury. In Garofalo v. Empire Blue Cross & Blue Shield, 67 F.Supp.2d 343 (S.D.N.Y. 1999), cited with approval in Emilien v. Stull Techs. Corp., 70 Fed. Appx. 635, 643 n.3 (3d Cir. 2003), plaintiffs sought recovery for past overcharges on their hospital bills. Only one named plaintiff, however, was shown to have actually been overcharged, and her entire bill was subsequently reimbursed under her personal insurance, "so that she suffered no actual out-of-pocket loss." Id. at 347. The court therefore held that plaintiffs lacked standing to maintain the suit, "since neither suffered actual injury in respect to these claims." Id. at 346. A similar result was reached in QST Envtl., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, No. CIV.98-572-M, 2002 WL 1072310 (D.N.H. May 28, 2002), which held that "[t]he collateral source rule . . . applies only to preserve an award of damages and does not affect a party's standing to litigate a claim." Id. at *2 n.2.

The court in In re Trasylol Prods. Liab. Litig., No. 08-MD-01928, 2010 WL 6098571, *14 (S.D. Fla. March 16, 2010), similarly dismissed plaintiff's unfair and deceptive trade practices claims because "there is no evidence that [plaintiff] lost any

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Associated Elec. Coop., Inc., 818 S.W.2d 669 (Mo. App. W.D. 1991) (personal injuries from a fall while painting).

money as a result of [defendant's] alleged unfair or deceptive trade practices, he cannot prove an essential element of his claim." The court also rejected the plaintiffs' argument that he had standing under the collateral source rule. Id. at *15.

In sum, Appellants' lengthy discourse on the collateral source rule studiously avoids discussing the essential prerequisite for the rule to apply: that a plaintiff sustain damages for which he or she has insurance coverage. Here, the Appellants sustained no damages, and were not insured for the "injury" that was sustained by other parties. For these reasons, the rule is inapplicable and cannot be used to confer standing on Appellants or create an injury for which they can recover damages.

## CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

## CERTIFICATE OF COMPLIANCE

The undersigned certifies, pursuant to Rule 84.06(b), that the Substitute Brief of Respondent St. John's Mercy Health System d/b/a/ St. John's Mercy Medical Center contains 9,712 words, excluding the cover, this certification and the signature block, as counted by Microsoft Word, and that the electronic copy of this brief was scanned for viruses and found to be virus-free.

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